No. 91-6824

In The

Supreme Court of the United States

October Term, 1991

GLORIA ZAFIRO, JOSE MARTINEZ,
SALVADOR GARCIA, ALFONSO SOTO,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether criminal defendants are entitled to separate trials when their defenses are mutually antagonistic.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 945 F.2d 881 (7th Cir. 1991). This opinion is reproduced in the Joint Appendix at 110-122. The United States District Court for the Northern District of Illinois did not issue a written opinion in this case. The judgments appealed from are reproduced in the Joint Appendix at 63, 74, 96, and 104.

JURISDICTION OF THIS COURT

The Seventh Circuit Court of Appeals issued its opinion in this matter on September 26, 1991. No petition for a rehearing was filed in this matter. The petition for a writ of certiorari was filed timely within 90 days thereafter and this Court granted Certiorari on March 23, 1992. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

This case concerns the constitutionally secured right to due process of law under Amend. V, and the constitutionally secured right to equal protection of the law under Amend. XIV.

Amend. V (1791)

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in

the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. XIV (1868)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Rule 14 of the Federal Rules of Criminal Procedure authorizes a trial court to sever defendants for separate trials: "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires." Fed. R. Crim. P. 14.

STATEMENT OF THE CASE

This is a criminal case. The defendants, Salvador Garcia, Jose Martinez, Alfonso Soto, and Gloria Zafiro, were charged with conspiring to possess cocaine, heroin, and marijuana with intent to deliver in violation of 21 U.S.C. 841(a) and 846 and with possession of heroin, cocaine, and marijuana with intent to distribute in violation of 21 U.S.C. 841(a).

Prior to trial, Defendants Alfonso Soto, Salvador Garcia and Jose Martinez moved for a severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure. Judge Bua, however, denied the motions. Counsel for Salvador Garcia made motions for mistrial and renewed motions for a mistrial based on trial testimony. The Defendants were then jointly tried before a jury in the United States Court for the Nortnern District of Illinois, Eastern Division.

Defendants Garcia, Martinez and Soto were found guilty as charged. Defendant Zafiro was found guilty of conspiring to possess cocaine, heroin and marijuana with intent to distribute, but not guilty of the substantive counts.

Gloria Zafiro, Alfonso Soto and Salvador Garcia were sentenced to one hundred fifty one (151) months imprisonment, to be followed by a five (5) year term of supervised release.

Jose Martinez was sentenced to two hundred sixty two (262) months imprisonment, to be followed by a five (5) year term of supervised release.

Defendants timely filed their Notices of Appeal with the Seventh Circuit Court of Appeals on November 17, 1989, November 30, 1989, December 15, 1989, and December 6, 1989, respectively. The Seventh Circuit Court of Appeals affirmed the Defendants convictions by an opinion issued on September 26, 1991.

Petitions for writ of certiorari were timely filed within 90 days by both the Defendants and the Government.

This court granted Certiorari on March 23, 1992.

SUMMARY OF ARGUMENT

Salvador Garcia, Alfonso Soto and Jose Martinez were friends. Gloria Zafiro was Mr. Martinez's girlfriend. The evidence at petitioners' joint trial established that petitioners distributed illegal narcotics from Zafiro's apartment in Cicero, Illinois, and Mr. Soto's bungalow in Chicago, Illinois. On February 22, 1989, government agents followed Alfonso Soto and Salvador Garcia as they transported a large, heavy box in Mr. Soto's Buick from his garage to Gloria Zafiro's apartment. A government agent followed Mr. Soto and Mr. Garcia up the stairs of Ms. Zafiro's building. Agents entered Ms. Zafiro's apartment and found all four petitioners in the living room.

The box that Mr. Soto and Mr. Garcia were carrying contained 55 pounds of cocaine. In Ms. Zafiro's bedroom closet, agents found a suitcase containing approximately 25 grams of heroin, 16 pounds of cocaine and four pounds of marijuana. During a search of a Ford Probe in

Mr. Soto's garage, agents found approximately eight additional pounds of cocaine. The Ford Probe was registered to Maria Vera, also a girlfriend of Martinez.

Pursuant to Fed. R. Crim. P. 14, Mr. Garcia and Mr. Soto moved for severance of their trials on the ground that their defenses were mutually antagonistic. The district court denied their motions. At trial, Mr. Soto testified that he knew nothing about the drug conspiracy. Rather, he claimed that Mr. Garcia had come to stay with him and had used the Buick and the Ford Probe. Mr. Soto further testified that he had given Mr. Garcia an empty box at the latter's request and that he did not know that Mr. Garcia had placed the box in the trunk of the Buick until they arrived at Ms. Zafiro's apartment. Mr. Soto testified that he did not know what was inside the box until it was opened after their arrest. Although Mr. Garcia did not testify, his theory of defense, as presented by his lawyer during closing argument, was exactly opposite. He argued that the box belonged to Mr. Soto and that Mr. Garcia knew nothing about it.

Mr. Martinez unsuccessfully moved for a severance on the ground that Ms. Zafiro's defense was antagonistic to his own. Ms. Zafiro testified that Martinez stayed in her apartment from time to time but did not live there. She also testified that she did not know what was in the suitcase that was found in her bedroom closet. She stated that Martinez had brought the suitcase to her apartment two days before petitioners were arrested and that he did not tell her what was in the suitcase. Mr. Martinez' lawyer argued that Mr. Martinez did not know that any cocaine was going to be delivered to Zafiro's apartment or that the suitcase in Zafiro's closet contained drugs.

The defendants were all found guilty and appealed.

In affirming, the court of appeals held that the district court did not err by denying a severance to each of the defendants. The court noted that many cases have stated that a defendant is entitled to a severance when the defendants present "mutually antagonistic defenses" such that the acceptance of one party's defense would lead the jury to conclude that the other party is guilty. J.A. 110-118. The court incorrectly refused to adopt that standard. It explained that "[t]he fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid the 'scandal and inequity of inconsistent verdicts' " (quoting *Richardson v. Marsh*, 481 U.S. 200, 210 (1987)). The court stated: "The analogy of interpleader comes to mind, Fed. R. Civ. P. 22; also such joint tort cases." J.A. 114.

The difficulty in this reasoning is that this Seventh Circuit opinion fails to recognize the fundamental difference between a civil and a criminal case. The court concluded that "persons charged in connection with the same crime should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants."

The court offered examples of such a case. First, in "a *complex* case with *many* defendants some of whom might be only *peripherally* involved in the wrongdoing," severance would be required because "the bit players may not be able to differentiate themselves in the jurors' minds

from the stars." J.A. 114. Second, severance may be warranted "where exculpatory evidence essential to a defendant's case will be unavailable – or highly prejudicial evidence unavoidable – if he is tried with another defendant." J.A. 116. Third, where all but one of the defendants try to place blame on that one "so that he finds himself facing a barrage of prosecutors – the official prosecutor and the other defendant's lawyers." J.A. 117. The issue of severance, the court reasoned, should rarely be determined by reference to the existence of mutually antagonistic defenses; rather, "[i]f it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted – and in either case there would be a miscarriage of justice."

The court of appeals found no basis for concluding that a joint trial would prevent a reliable jury verdict in this case:

> Each member of each pair of defendants (Soto-Garcia and Martinez-Zafiro) was accusing the other of being a drug dealer. In this symmetrical situation, each defendant had to defend himself against the prosecutor and one other defendant but at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, "Don't convict me, convict Garcia," and Garcia's lawyer could say, "Don't convict my client, convict Soto." This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing no one could question was that the government had found 75 pounds of cocaine on premises connected with these defendants. No defendant was placed at a *net* disadvantage by being paired with another

> defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial.

A joint trial, the court explained, offered the jury "the full picture," making it both less costly and less prone to error than separate trials would have been.

This decision is directly contrary to the long standing legal rule that mutually antagonistic defenses are grounds for a severance under Rule 14.

This opinion completely eviscerates the law of severance. While the court has placed great emphasis on preserving judicial economy, it has failed to ensure that the basic purpose of a criminal trial is served, to grant the defendant a fair trial based on the evidence against him, and him alone.

Petitioners urge the Court to reverse the judgment and to remand the cause for new, separate trials.

ARGUMENT

WHEN DEFENDANTS IN A CRIMINAL CASE PRESENT ANTAGONISTIC DEFENSES, EACH IS ENTITLED TO A SEVERANCE PURSUANT TO RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 14 of the Federal Rules of Criminal Procedure authorizes a trial court to sever defendants for separate trials:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may

> order an election or separate trial of counts, *grant a severance of defendants* or provide whatever other relief justice requires." Fed. R. Crim. P. 14. (emphasis added)

While the general rule is that persons jointly indicted should be jointly tried,[1] thus promoting judicial efficiency, where there is a risk of prejudice to one party, severance should be granted. *United States v. Lane*, 474 U.S. 473, 484 n.12, 106 S.Ct. 725, 88 L.Ed.2d 814, 826 n.12(7b) (1986); *United States v. Snively*, 715 F.2d 260 (7th Cir. 1983) cert denied 465 U.S. 1007, 104 S.Ct. 101, 79 L.Ed. 2d 233 (1984). See, *e.g.*, *United States v. Warner*, No. 90-3753 (6th Cir. Jan. 31, 1992), slip op. 10-11; *United States v. Tootick*, No. 90-30140 (9th Cir. Dec. 17, 1991), slip op. 16289; *United States v. Romanello*, 726 F.2d 173, 175 (5th Cir. 1984).

Alfonso Soto, Jose Martinez and Salvador Garcia respectfully assert that the trial judge erred in denying their Rule 14 severance motions. In so asserting, Petitioners Soto, Martinez and Garcia are aware that denial of their severance motions will be reviewed under an abuse of discretion standard requiring the defendants to establish that they could not have received a fair trial unless severance was granted. *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990). *United States v. Tanner*, 471 F.2d 128 (7th Cir. 1972).

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[1] Rule 8(b), Fed. R. Crim. P., provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

Alfonso Soto testified that on February 22, 1989, Salvador Garcia awakened him and asked for a ride to Cicero. (Trial Tr. 609). Mr. Garcia wanted Mr. Soto to drive. (Trial Tr. 609). Mr. Soto also testified that Mr. Garcia asked for an empty box. (Trial Tr. 664). Mr. Soto further testified that he was not in Ms. Zafiro's apartment at 11:00 on that morning. (Trial Tr. 660). He also testified he was not driving his Buick at that time either. (Trial Tr. 660). Mr. Soto testified that he did not know there was cocaine in the box, and that Mr. Garcia had borrowed the Ford Probe. (Trial Tr. 611-612). Alfonso Soto's defense was that he had no knowledge of the cocaine and that it was defendant Garcia who was responsible for everything.

Although Garcia did not testify, his defense as presented in his closing argument, was the complete opposite of Alfonso Soto's testimony. (Trial Tr. 839). Garcia denied being at Gloria Zafiro's apartment on the morning of February 22, 1989. Mr. Garcia's defense was that he did not know there was cocaine in the box, and that Mr. Soto had asked Mr. Garcia to go to Cicero. (Trial Tr. 839). Acceptance of defendant Soto's defense precluded acceptance of Garcia's defense.

Mr. Soto's defense was supported by Ms. Zafiro, who testified that Soto never was at the apartment that morning. (Trial Tr. 527). Instead, Gloria Zafiro testified that it was Salvador Garcia who came to the apartment on that morning. (Trial Tr. 527). Had the trial been severed, Mr. Soto's guilt or innocence would have been determined based on Soto's and Zafiro's testimony and the other evidence, independent of the prejudicial and biased defense presented by Garcia. Instead, the jury was presented with a diametrically opposed defense by Garcia

which implicated Mr. Soto. These defenses are mutually exclusive, that is, both cannot be true. Either Soto was not at the apartment and Garcia lied, or Soto was at the apartment and Soto lied. The jury could not have accepted both defenses. Therefore, Alfonso Soto could not have had a fair trial, because the jury, instead of determining just the credibility of Soto, had to determine Garcia's credibility in conjunction with Soto. The jury had two completely opposite factual scenarios that it had to consider.

Because the defenses of Mr. Soto and Mr. Garcia were antagonistic, and because the trial judge refused to sever their trials, it is respectfully asserted that Alfonso Soto did not receive a fair trial.

In the case of Jose Martinez, the government's job was simple; get by a Motion for Judgment of Acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure at the close of its case in chief and let Gloria Zafiro do the rest. They did, and Ms. Zafiro did not let them down.

How did the government know this? While the testimony elicited at the hearing on the motions to Quash Arrests and Suppress Evidence told a great deal, the cross-examination of their second witness, Maria Vera, set the scene.

Ms. Zafiro's attorney's response to Jose Martinez' attorney's objection to the cross-examination of Vera describes the antagonism better than anything that could be said here:

> I believe the evidence will show that this lady had three kilos of cocaine in her car which was

registered to her. That at the time of the incident, as a result and I believe there was no arrest of her; she was not prosecuted for whatever reason, I think that is a proper approach to take, and it is merely by an accident in geography that my client whose residence was used as a storage by the co-defendant, and, therefore, inculpated my client by his presence in her home, I think the jury could reasonably infer from that behavior, the keeping of her, the maintaining of the residence, buying her cars, supplying her food, which I believe the evidence will show is exactly the same scenario as my client had, yet, this lady, for whatever reason, is not prosecuted nor arrested. And I think the analogy is exactly the same. My point is my client should not be here, because the only reason she is here is that Jose Martinez stored his cocaine and other items at her residence, unbeknownst to her and without her active participation. (Trial Tr. 80).

It is noteworthy that Ms. Zafiro's attorney's closing argument continually analogized Gloria Zafiro to Maria Vera, in that each were used by Jose Martinez so he could store narcotics on their property. (Trial Tr. 783-785, 789).

Gloria Zafiro testified that the burgundy suitcase which contained the cocaine, marijuana and heroin which formed the basis for counts 2, 3 and 4 of the indictment was brought into her apartment by Jose Martinez two days prior to their arrest. Further, she testified that she had no idea what was in the suitcase and never handled it. (Trial Tr. 57, 75, 86, 346-347, 518-519, 542-543, 567, 579, 322-323, 326-328).

In fact, Gloria Zafiro testified that she had seen the suitcase inside the bedroom closet. (Trial Tr. 542-543). The suitcase, however, was found outside the closet. (Trial Tr. 347, 356).

Ms. Zafiro also testified that the bag which contained approximately $22,000.00 in United States currency was brought into her apartment the morning of their arrest by Jose Martinez. (Trial Tr. 57, 86, 273, 348, 358, 363, 520-521, 545, 571, 574, 576, 880).

Ms. Zafiro testified that Jose Martinez asked her to safeguard the bag, which she believed contained tavern proceeds. Although she testified she placed the bag on top of a knapsack in her closet, the currency was found inside the knapsack in the bedroom where Martinez had been sleeping. (Trial Tr. 57, 86, 273, 348, 358, 363, 520-524, 542-549, 571-576).

What Gloria Zafiro told the jury was that she was being used by Jose Martinez, who without her knowledge brought and was bringing narcotics and currency into her apartment, and, while purportedly sleeping, handled the narcotics and currency.

Gloria Zafiro did not stop there, however. She testified that on two occasions on February 22, 1989, strangers came to her apartment to see Jose Martinez. Each time she testified she had no conversation with them other than to say Jose was asleep. (Trial Tr. 535-539, 549-550, 556-559, 572).

According to Gloria Zafiro, when Mr. Soto and Mr. Garcia arrived sometime later that day, they were carrying a box which contained cocaine. To no one's surprise,

they again asked for Jose Martinez. Ms. Zafiro testified she went into the bedroom to make the bed and had no idea what was going on. (Trial Tr. 529-530, 550-551, 571-573, 580-584).

Jose Martinez denied the charges against him. Specifically, he denied any knowledge of the heroin, cocaine, marijuana and currency in Ms. Zafiro's bedroom and denied any knowledge of the cocaine which was in the box carried by Soto and Garcia. His theory of defense was that he was in the wrong place at the wrong time, and that his mere presence provided Zafiro the opportunity to protect herself by casting the blame on him. (Trial Tr. 796-797, 801, 304, 806).

It is respectfully asserted that acceptance of Ms. Zafiro's defense, that without her knowledge Jose Martinez brought and arranged to bring narcotics into her house, precluded acceptance of Mr. Martinez' defense; that without his knowledge, Ms. Zafiro had narcotics in and was having narcotics delivered to her house.

Had the trial judge severed Zafiro and Martinez' trials, the jury never would have heard Zafiro's prejudicial and biased testimony.

Either Ms. Zafiro had no knowledge of the narcotics and Mr. Martinez did or Mr. Martinez had no knowledge of the narcotics and Ms. Zafiro did. Both positions cannot be true and therefore acceptance of one defense precluded acceptance of the others.

Because the defenses of Zafiro and Martinez were antagonistic and because the trial judge refused to sever

their trials, it is respectfully asserted that neither Ms. Zafiro nor Mr. Martinez received a fair trial.

Maurice Dailey testified that on February 22, 1989, a surveillance was conducted by Dailey and several other officers under his supervision, at 1925 South 51st Court in Cicero, Illinois (Trial Tr. 42). Dailey stated that a maroon Buick, driven by Alfonso Soto (Trial Tr. 45), pulled from the front of the residence and was followed by several persons on the surveillance team (Trial Tr. 44) to 3517 West 38th Street (Trial Tr. 46). Dailey stated that Appellant Garcia joined Soto (Trial Tr. 48). Thomas Bridges, witness for the government, testified that he saw Mr. Soto and Appellant Garcia leave the premises of 3517 West 38th Street carrying a brown cardboard box (Trial Tr. 269). Dailey also related that the two gentlemen returned to the original residence at 1925 South 51st Court in Cicero (Trial Tr. 48).

Dailey stated that he was witness to Mr. Soto and Appellant Garcia carrying this large cardboard box up the stairs (Trial Tr. 49). It was at this time that Dailey announced he was a police officer (Trial Tr. 49), and chased Soto and Garcia into an apartment where Jose Martinez and Gloria Zafiro were residing (Trial Tr. 50). Dailey discovered that the box Soto and Garcia were carrying contained twenty seven packages of cocaine (Trial Tr. 52, 58). Dailey arrested the four defendants (Trial Tr. 53), and directed two officers to return to 3517 West 38th Street and wait until they received à search warrant for that location (Trial Tr. 53).

When the officers arrived at that residence, which belonged to Mr. Soto (Trial Tr. 304), a woman answered

the door and consented to a search and the officers found a scale known to be used for packaging drugs (Trial Tr. 54). Dailey continued his testimony by revealing that after going into the garage and opening the trunk of a black Ford Probe which was registered to a Maria Vera (Trial Tr. 163), he found a duffel bag with taped packages within it that was later determined to have contained cocaine (Trial Tr. 55). The keys for the Ford Probe were found on the person of Alfonso Soto (Trial Tr. 56). Dailey further related that a search warrant was issued for the residence on 1925 South 51st Court (Trial Tr. 56), and a suitcase was discovered which contained marijuana, heroine and cocaine (Trial Tr. 58).

Dailey testified to have found a driver's license and voter's registration card of Appellant Garcia with the address of 3517 West 38th Street on them (Trial Tr. 66), yet further testified that the drivers license was issued July 31, 1985 and expired April 4, 1989 (Trial Tr. 147) and the voters registration card was from 1987 (Trial Tr. 148). Dailey verified that Appellant Garcia did, at one time, own the house on 38th Street, but Appellant Garcia sold it (Trial Tr. 146).

Appellant Garcia asserts that the defense that he posed below, that he was never actually in possession of the cocaine (Trial Tr. 839), and that possession of the cocaine was by co-defendant Soto, was legally, factually, and logically rebutted by the actual defense and trial testimony of Soto who testified that Appellant Garcia was the mastermind and knowing possessor of the cocaine (Trial Tr. 663-664). Appellant Garcia argues that the defense and the actual conduct at trial by Soto and his

trial counsel deprived him of a fair trial and compelled a severance in the interests of justice.

In this case, presenting Appellant Garcia's defense under the circumstances of facing both the government prosecutor and a second prosecutor (Soto), the likelihood of confusion and the resulting denial of a fair trial was inexcusable. See, *United States v. Ziperstein*, 601 F.2d 281, 285 (7th Cir. 1979) and *United States v. Romanello*, 726 F.2d 173, 174, 182 (5th Cir. 1984).

Because the defenses of Mr. Soto and Mr. Garcia were antagonistic and because the trial judge refused to sever their trials, it is respectfully asserted that Salvador Garcia did not receive a fair trial.

This case is factually and legally close to the situation discussed in *United States v. Ziperstein*, 601 F.2d 281 (7th Cir. 1979):

> An example of "mutually antagonistic" defenses is presented in *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). In *DeLuna*, one defendant claimed that he came into possession of narcotics only when the other defendant saw the police approach and shoved the drugs into his hands. The other defendant, however, denied having ever possessed the drugs and claimed that they had always been in the possession of the first defendant. In a case such as *DeLuna*, where someone must have possessed the contraband, and one defendant can only deny his own possession by attributing possession and consequent guilt to the other, the defenses are antagonistic. *Ziperstein*, 601 F.2d at 285 (7th Cir. 1979).

In *accord, Smith v. Kelso,* 863 F.2d 1564, 1569-1571 (11th Cir. 1989).

Likewise, in *United States v. Romanello,* 726 F.2d 173 (5th Cir. 1984), the Fifth Circuit, in the colorful language of Judge Goldberg, made the following salient comments on the antagonism of defenses and defendant and the effects of such a situation upon a fair trial:

> Conspiracy trials, with their world-girdling potential, are given more extensive thrust by the admission of hearsay testimony, the use of conspiratorial acts to prove substantive offenses, and the joint trial of defendants. These pressures alone threaten to undermine the fair consideration of individual conspiracy defendants. However, the dangers inherent in joint trials become intolerable when the co-defendants become gladiators, ripping each other's defenses apart. In their antagonism, each lawyer becomes the government's champion against the co-defendant, and the resulting struggle leaves both defendants vulnerable to the insinuation that a conspiracy explains the conflict. *Romanello,* 726 F.2d at 182.

And also:

> I saw a lizard come darting forward on six great taloned feet and fasten itself to a [fellow soul] . . . [T]hey fused like hot wax, and their colors ran together until neither wretch nor monster appeared what he had been when he began . . . [citing Dante, *The Inferno,* Canto XXV, Circle 8, Bolgia 7, lines 46-48, 58-60 (J. Ciardi, transl)]. Quoted at 726 F.2d at 182.

The joint trial of conspiracy defendants was originally deemed useful to prove that the parties planned their crimes together. However, it has become a powerful tool for the government to prove substantive crimes and to cast guilt upon a host of co-defendants. In this case, we are concerned with the specific prejudice that results when defendants become weapons against each other, clawing into each other with antagonistic defenses. Like the wretches in Dante's hell, they may become entangled and ultimately fuse together in the eyes of the jury, so that neither defense is believed and all defendants are convicted. Under such circumstances, the trial judge abuses its discretion in failing to sever the trials of the co-defendants. *Romanello,* 726 F.2d at 174.

THIS SEVENTH CIRCUIT DECISION IS IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS AND ITS PRIOR DECISIONS.

Unlike the court in this case, other courts of appeals have held that severance is required when defendants present squarely antagonistic defenses. Thus, the Fifth Circuit has held that a defendant may "compel severance" when the defenses at trial are "antagonistic to the point of being irreconcilable and mutually exclusive." *Romanello,* 726 F.2d at 177; see also *United States v. Crawford,* 581 F.2d 489, 492 (5th Cir. 1978). The Tenth Circuit has likewise required a severance when the defendants' defenses are "mutually exclusive," so that the acceptance of the defense of one defendant would "tend to preclude the acquittal of [the other]." *United States v. Peveto,* 881 F.2d 884, 858 (10th Cir. 1989); *United States v. Smith,* 788

F.2d 663, 668 (10th Cir. 1986). The Eleventh Circuit has followed a similar rule. In *United States v. Rucker*, 915 F.2d 1511 (11th Cir. 1990), the court held that a new trial is required if two defendants' stories are mutually exclusive and irreconcilable so that the "juxtaposition of the co-defendants' protestations of innocence would make each defendant 'the government's best witness against the other.' " *Id.* at 1513 (quoting *Crawford*, 581 F.2d at 492).

Under the principles applied in these decisions, petitioners would have been entitled to severance because of their mutually exclusive and irreconcilable defenses. Soto and Garcia were caught transporting a large cardboard box containing 55 pounds of cocaine. Each defendant claimed that he had no knowledge of the contents of the box because it belonged to the other defendant. No reasonable juror could have believed that neither of the defendants had dominion and control over the large box of cocaine that both of them were driving across town; hence, the core of each defendant's defense implicated the other in the crime. The same is so with respect to Martinez and Zafiro. If Martinez had stored the suitcase with Zafiro, and Zafiro did not know that it contained 20 pounds of cocaine, that would have tended to preclude Martinez from being acquitted on the theory presented by his lawyer – that Martinez was unaware of the contents of a suitcase found in someone else's apartment. If, on the other hand, the jury believed Martinez's account, Zafiro's defense would have collapsed.

Other courts have adopted varying formulations of the rule requiring a severance when defendants take positions at odds with those of their co-defendants. In some circuits, conflicting defenses will require severance when

the conflict is so prejudicial that the differences are irreconcilable, and the jury will unjustifiably infer that the conflict itself indicates the guilt of both defendants. See, *e.g., United States v. Clark*, 928 F.2d 639, 644 (4th Cir. 1991); *United States v. Davis*, 623 F.2d at 188 (1st Cir. 1980); *United States v. Haldeman*, 559 F.2d 31, 71 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). The Ninth Circuit recently concluded that the need for severance must be evaluated by reference to whether the jury is able "to assess the guilt or innocence of each defendant on an individual and independent basis." *United States v. Tootick*, No. 90-30140 (9th Cir. Dec. 17, 1991).

The Seventh Circuit has previously recognized the importance of severance in *United States v. Snively*, 715 F.2d 260 (7th Cir. 1983), *cert. denied* 465 U.S. 1007 (1984). When the parties present antagonistic defenses, prejudice exists and severance pursuant to Rule 14 is appropriate. *United States v. Oglesby*, 764 F.2d 1203 (7th Cir. 1985). Severance should therefore be granted where acceptance of one defendant's defense precludes acceptance of the other defendant's defense. *United States v. Buljubasic*, 808 F.2d 1260 (7th Cir. 1987); *United States v. Gironda*, 758 F.2d 1201 (7th Cir. 1985).

The factual scenario herein is entirely different from others considered by the Seventh Circuit. This case is not merely the antagonism caused by the different defenses of not guilty and entrapment, *United States v. Williams*, 858 F.2d 1218 (7th Cir. 1988) *cert. denied*, 109 S.Ct. 796; nor the antagonism caused by the conflict of a non-participation defense and an insufficiency of evidence defense, *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990); nor

the antagonism caused by the conflict of a lack of knowledge defense and entrapment, *United States v. Rollins*, 862 F.2d 1828 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 2084.

CONCLUSION

The Seventh Circuit's opinion in this case is not only a substantial departure from the existing law of severance, it is contrary to that body of law. Failure to grant the Defendants' request for severance denies them a fair trial. This Court should reverse the decision of the Seventh Circuit and grant the Defendants new, separate trials.

Respectfully submitted,

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